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Georgia's Approach to Proportionality and Sanctions for the Spoliation of Electronically Stored Information

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GEORGIA'S APPROACH TO PROPORTIONALITY AND SANCTIONS FOR THE SPOLIATION OF ELECTRONICALLY STORED INFORMATION

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ABSTRACT

The rapid evolution and implementation of technology in society has resulted in the increasing use of data as evidence in court. While the scope of discovery is limited by, among other things, the burden imposed on the producing party, the sheer magnitude of electronic evidence compared to its physical counterpart necessitates a different framework for evaluating such a burden. Without limiting factors, the discoverability of electronically stored information (ESI) exposes producing parties to liability disproportionate to the value of a case. While the Federal Rules of Civil Procedure have evolved to address the discovery of ESI, the Georgia Civil Practice Act has remained largely stagnant, requiring judges to retrofit existing case law governing physical evidence to include ESI. This Note examines Georgia's approach to the discovery of electronic evidence and proposes changes to modernize the state's approach to eDiscovery.

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INTRODUCTION

The epoch of big data and the utilization of emerging technologies give rise to new litigation practices surrounding the discovery and use of electronically stored information (ESI).[1] Particularly in Georgia, a rapidly evolving hub for technology and innovation, the procedures governing the discovery of ESI struggle to keep up with the developments.[2] The current laws provide little distinction between physical evidence and electronically stored data, leaving parties at risk of unintended consequences where best practices around these two types of evidence diverge.[3]

Electronic discovery (eDiscovery), "[t]he process of identifying, locating, preserving, collecting, preparing, reviewing, and producing [ESI] in the context of the legal process," began as a nuanced aspect of complex litigation surrounding large corporations with massive amounts of data but is slowly making its way into smaller cases across the judicial system.[4] These changes in technology and its use

1. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (explaining the impact of expanded data storage on discovery); The Sedona Conf., *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467, 520 (2016) [hereinafter The Sedona Conf., *Commentary on Rule 34 & Rule 45*]; The Sedona Conf., *Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 311 (2014) [hereinafter The Sedona Conf., *The Sedona Conference Glossary*] (defining "Big Data" as "[e]normous volumes of data, often distributed and loosely structured, that may be challenging to process with traditional technology solutions").

2. H.B. 1017, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); Kevin Bradberry, *Electronic Discovery in Georgia: Bringing the State out of the Typewriter Age*, 26 GA. ST. U. L. REV. 551, 574 (2012); Allen N. Trask III, *IHeadache: The Incorporation of Metadata into Discovery in Litigation and Its Impact on You*, WARD & SMITH P.A. (Jan. 8, 2013), https://www.wardandsmith.com/articles/the-incorporation-of-metadata-into-discovery-in-litigation [https://perma.cc/A33C-URQC].

3. Glispie v. State, 779 S.E.2d 767, 774 (Ga. Ct. App. 2015) (explaining that Georgia law has no special rules differentiating physical and electronic evidence), *vacated*, 801 S.E.2d 910 (Ga. Ct. App. 2017). *Compare* O.C.G.A. § 9-11-26 (2015 & Supp. 2020) (establishing a uniform scope and procedure for the discovery of all evidence), *with* FED. R. CIV. P. 34(b)(2) (providing guidance specifically differentiating ESI from physical evidence).

4. The Sedona Conf., *The Sedona Conference Glossary*, *supra* note 1, at 323; *see also* The Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 28 (2018) [hereinafter The Sedona Conf., *The Sedona Principles*].

in court implicate ethical obligations for attorneys who are required to zealously advocate for their clients.[5]

Data and its corresponding metadata provide searchable information that enable a party to learn more about electronic files and their origins.[6] Metadata, data about data, include descriptive, structural, administrative, or reference data relating to a particular file—information that may be useful in pending litigation.[7] For example, the metadata for an image file might include the time the photo was taken, the device it was taken on, and, in some cases, the GPS location where the photo was taken.[8] But failure to properly preserve and collect this kind of digital evidence to avoid spoliation can impair, if not eliminate, its utility.[9] The Sedona Conference—a research group comprised of practicing lawyers from both the plaintiffs' and defense bar, judges, and academics seeking to advance legal study surrounding litigation and technology—defines spoliation

5. Tyler D. Trew, *Ethical Obligations in Electronic Discovery*, A.B.A., https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/ethical-obligations-in-electronic-discovery/ [https://perma.cc/PVB6-AEHS]. In October of 2019, the State Bar of Georgia proposed an amendment to the Georgia Rules of Professional Conduct to expand a lawyer's obligation of competence to include "the benefits and risks associated with relevant technology." *Id.*; *The Sedona Conference Cooperation Proclamation*, SEDONA CONF. WORKING GRP. SERIES, https://thesedonaconference.org/sites/default/files/publications/The%2520Sedona%2520Conference%2520Cooperation%2520Proclamation_1.pdf [https://perma.cc/ML4Q-78UC]; State Bar of Ga., Bd. of Governors, Meeting Minutes (Oct. 19, 2019, 9:00 AM), https://www.gabar.org/committeesprogramssections/boardofgovernors/upload/BG10-19.pdf [https://perma.cc/NJ8P-D7GU]; STATE BAR OF GA., BOG BOARD BOOK: 2019 FALL MEETING 27 (2019); Bob Ambrogi, *Georgia Moves Closer to Adopting Duty of Technology Competence*, LAWSITES (Nov. 4, 2019), https://www.lawsitesblog.com/2019/11/georgia-moves-closer-to-adopting-duty-of-technology-competence.html [https://perma.cc/5NTN-EA2H].

6. *See* Burkhard Schafer & Stephen Mason, *The Characteristics of Electronic Evidence*, *in* ELECTRONIC EVIDENCE 18, 27 (Stephen Mason & Daniel Seng eds., 4th ed. 2017); Trask, *supra* note 2. *See generally* The Sedona Conf., *Commentary on Ethics & Metadata*, 14 SEDONA CONF. J. 169 (2013) [hereinafter The Sedona Conf., *Commentary on Ethics*].

7. *Metadata*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Secondary data that organize, manage, and facilitate the use and understanding of primary data. Metadata are evaluated when conducting and responding to electronic discovery. If privileged documents or final versions of computer files may contain metadata, they might be 'scrubbed' before release."); The Sedona Conf., *Commentary on Ethics*, *supra* note 6, at 173.

8. *What Is Photo Metadata?*, INT'L PRESS TELECOMMS. COUNCIL, https://iptc.org/standards/photo-metadata/photo-metadata/ [https://perma.cc/DB49-NNK9].

9. Alexandra Marie Reynolds, *Spoliating the Adverse Inference Instruction: The Impact of the 2015 Amendment to Federal Rule of Civil Procedure 37(e)*, 51 GA. L. REV. 917, 919 (2017).

as "the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit."[10]

This Note evaluates the state of eDiscovery in Georgia in comparison to federal law on the subject. Part I examines the current body of federal law surrounding eDiscovery. Part II analyzes the application and implementation of Georgia's standards in court, addresses significant differences between state and federal laws, and identifies current barriers to the advancement and expansion of the law. Part III proposes alterations to Title 9 of the Official Code of Georgia Annotated (Code) that would modernize Georgia's rules of civil practice in the age of big data.

I. BACKGROUND

EDiscovery, as a body of evidentiary case law distinct from that controlling physical evidence, emerged with the new millennium and evolved over the subsequent decade.[11] The 2006 and 2015 amendments to the Federal Rules of Civil Procedure (FRCP) further shaped the discovery of ESI in the federal court system by codifying rules that distinguish data from other forms of evidence.[12] The amendments impacted the "scope, speed and specificity" of a party's obligations in discovery, particularly by establishing guidance for proportionality and preservation standards.[13]

10. The Sedona Conf., *The Sedona Conference Glossary*, *supra* note 1, at 356.

11. The Sedona Conf., *The Sedona Principles*, *supra* note 4.

12. CHIEF JUSTICE JOHN G. ROBERTS, JR., U.S. SUP. CT., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/UYH4-SG6Z]; Brisa Izaguirre Wolfe & Amy D. Fitts, *Amending Electronic Discovery Under the New Federal Rules of Civil Procedure*, A.B.A. (Dec. 21, 2015), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2015/amending-electronic-discovery-under-new-federal-rules-of-civil-procedure/ [https://perma.cc/7YGZ-YDDC].

13. CHIEF JUSTICE ROBERTS, *supra* note 12, at 6; *E-Discovery Update: Federal Rules of Civil Procedure Amendments Go into Effect*, MCGUIREWOODS (Dec. 1, 2015), https://www.mcguirewoods.com/client-resources/Alerts/2015/12/E-Discovery-Update [https://perma.cc/MF6B-XWU3].

A. Proportionality Under Rule 26(b)

An overarching principle of proportionality guides the discovery of evidence; however, the sheer magnitude of existing data underscores the particularly important role in its application to ESI.[14] Rule 26(b)(1) balances the burdens of production with the benefits the evidence would provide at trial.[15] The proportionality standard of Rule 26(b) governs both the extent of the evidence that a party must preserve and the scope of production.[16]

1. Duty to Preserve

The duty to preserve evidence arises from a common-law duty, supplemented by the propagation of the FRCP.[17] Though Rule 26(b) limits the scope of discovery, it creates an affirmative obligation to preserve evidence relevant either to pending litigation or a reasonably foreseeable future lawsuit.[18] Producing parties need not preserve every document that may be discoverable; rather, they must show a good faith effort relative to the magnitude of the case at hand.[19]

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14. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 135; The Sedona Conf., *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 143, 148 (2017) [hereinafter The Sedona Conf., *Commentary on Proportionality*]. Though 26(b) has included proportionality language since 1983, the advisory committee notes that both courts and litigants must cooperate to reduce the burden and cost of discovery arising from large volumes of ESI. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. *See generally* George R.S. Weir & Stephen Mason, *The Sources of Electronic Evidence*, *in* ELECTRONIC EVIDENCE, *supra* note 6, at 1.

15. FED. R. CIV. P. 26(b)(1); CHIEF JUSTICE ROBERTS, *supra* note 12, at 5–9; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 65.

16. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 93. *See generally* The Sedona Conf., *Commentary on Proportionality*, *supra* note 14.

17. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; The Sedona Conf., *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341, 349 (2019) [hereinafter The Sedona Conf., *Commentary on Legal Holds*]; Samantha V. Ettari, *Reasonable Anticipation of Litigation Under FRCP 37(e): Triggers and Limits*, 2017 PRAC. L.J.: LITIG. 30, 30 (2017).

18. FED. R. CIV. P. 26(b); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (establishing that "[t]he obligation to preserve evidence arises when [a] party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation" (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001))); The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 354.

19. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; The Sedona Conf.,

Compliance with the preservation obligation requires a determination of when the duty to preserve took effect and of the scope of evidence it may cover.[20]

Most often, notice of a lawsuit triggers a party's preservation obligation.[21] However, the duty arises "not only during litigation but extends" to the period before litigation when a party should reasonably know that the evidence may be relevant to anticipated litigation.[22] As such, a party's reasonable expectation of a pending lawsuit triggers a producing party's common-law obligation to refrain from the destruction of relevant evidence and affirmative statutory obligation to preserve information and data that may be sought in litigation.[23]

Must a producing party perfectly preserve all data? Once pending litigation triggers the preservation obligation, a party must preserve that which is reasonable and proportionate in light of litigation.[24] The 2015 amendments narrowed the interpretation of "relevance" by removing key phrases from the text of the rule that otherwise allowed

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Commentary on Legal Holds, *supra* note 17, at 352; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 93.

20. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 93 ("The preservation analysis includes two aspects: When the duty arises, and the scope of ESI that should be preserved.").

21. Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 620–21 (D. Colo. 2007) ("To ensure that the expansive discovery permitted by Rule 26(b)(1) does not become a futile exercise, putative litigants have a duty to preserve documents that may be relevant to pending or imminent litigation. . . . In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit.").

22. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Henkel Corp. v. Polyglass USA, Inc., 194 F.R.D. 454, 456 (E.D.N.Y. 2000); The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 354.

23. Bouchard v. U.S. Tennis Ass'n, No. 15 Civ. 5920, 2017 U.S. Dist. LEXIS 143236, at *3 (E.D.N.Y. Sept. 5, 2017) (defining "pending or reasonably foreseeable litigation" as the initial trigger of the producing party's duty to preserve); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 93.

24. FED. R. CIV. P. 26(b)(1); *see also* FED. R. CIV. P. 37(e). Rule 26(b)(1) states:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1).

discovery of information related to "the subject matter involved in the action" and that which appears "reasonably calculated to lead to the discovery of admissible evidence."[25] In the context of ESI, the language intended to mollify concerns of discovery abuse surrounding high-volume data by curtailing the scope of what a party can request.[26]

2. Reasonable Preservation Measures

Recognizing the near impossibility of perfect preservation, the law only requires a preserving party demonstrate good-faith, reasonable steps to preserve ESI.[27] Reasonable preservation measures balance an entity's duty to preserve with its need to minimize disruption and continue operating.[28] Practices such as identifying relevant custodians and implementing legal holds tend to weigh in favor of a good faith determination, though the final determination depends on the specific facts.[29]

3. Proportionality in Production

The proportionality standard extends to the production of ESI by limiting the expenses incurred by the producing party and narrowing the scope of what must be produced to the requesting party and

25. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 356 n.27.

26. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 350–51; The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 150.

27. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 351; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 60–61.

28. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 95.

29. The Sedona Conf., *Commentary on Legal Holds*, *supra* note 17, at 357; *The Sedona Principles*, *supra* note 4, at 104; The Sedona Conf., *The Sedona Conference Glossary*, *supra* note 1, at 336 ("A legal hold is a communication issued as a result of current or reasonably anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of records."). These holds may address retention procedures affecting both accessible data and data that may not otherwise be reasonably accessible by the custodian. The Sedona Conf., *The Sedona Conference Glossary*, *supra* note 1, at 336.

how.[30] Though preservation and production costs generally remain the expense of the producing party, Rule 26 provides an avenue for allocating these expenses where the producing party is disproportionately affected.[31] Discoverable documents need only be produced in one form, generally the form in which they are kept during the course of business.[32] Where the ordinary form may not be usable by the requesting party, producing parties are best equipped to identify the optimal form of production.[33]

B. Preservation Sanctions: Addressing Spoliation Under Rule 37(e)

The newly-revised Rule 37(e) indicates a complete change in the federal approach to a party's failure to preserve ESI.[34] These revisions not only reinforce the proportionality and reasonableness standards of Rule 26, but they also necessitate their application in achieving a just and equitable resolution.[35] Rule 37(e) lays out a three-step analysis in determining a party's responsibility for the loss

30. FED. R. CIV. P. 26(b)(2)(B) ("*Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."); *see also* CHIEF JUSTICE ROBERTS, *supra* note 12, at 7.

31. FED. R. CIV. P. 26(c)(1) ("The court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense, including . . . specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery . . . ."); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 188 (providing six proportionality factors useful in determining cost allocation). *But see* The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 189 ("The cost of preservation should be allocated only in extraordinary circumstances."). However, the comments make it clear that these cost-shifting measures are not supposed to open the floodgates to disproportionate discovery. FED. R. CIV. P. 26(c)(1) advisory committee's note to 2015 amendment.

32. FED. R. CIV. P. 34(b)(2)(E)(iii) ("A party need not produce the same electronically stored information in more than one form."); *Zubulake*, 220 F.R.D. at 218 ("A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches . . . ."); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 184.

33. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 118.

34. *Compare* FED. R. CIV. P. 37(e) (providing remedial measures for parties affected by a party's "Failure to Provide Electronically Stored Information"), *with* FED. R. CIV. P. 37(e) (2006) (repealed 2015) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."); *see also* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

35. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 148–50.

of data and the extent to which it may face consequences.[36] In evaluating the most appropriate course of action, the court must consider whether reasonable steps were taken to preserve the evidence, the prejudice experienced by the non-producing party, and whether the producing party acted with the intent to deprive another party of the information during litigation.[37] Such action might include a measure to cure judicial prejudice, or it may take a stronger approach by imposing sanctions.[38]

1. Were Reasonable Steps Taken to Preserve ESI?

The first inquiry requires a determination of whether the producing party demonstrated reasonable preservation efforts.[39] Under the proportionality in preservation guidelines, sanctions are not appropriate where a court finds that a party took reasonable steps to preserve electronic evidence.[40] However, where a court finds that a

36. FED. R. CIV. P. 37(e). Remedies include curative measures that only aim to cure the prejudice to the requesting party and more severe sanctions meant to "deter failures to preserve electronically stored information." FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

37. FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194–97.

38. FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193 ("The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information."). Curative measures seek only to ameliorate prejudice resulting from lost evidence; they may include case-altering sanctions (such as preclusion of evidence, an adverse inference, or dismissal), repayment of costs incurred by the requesting party, or both. *Compare* Snider v. Danfoss, No. 15-CV-4748, 2017 U.S. Dist. LEXIS 107591, at *19 (N.D. Ill. July 12, 2017) (finding curative measures unnecessary where the producing party's failure to preserve did not prejudice the requesting party), *with* Cat3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016) (ordering the producing party to reimburse the requesting party's expenses to address economic prejudice and precluding the producing party's use of spoliated e-mails as evidence). Courts will impose judicial sanctions upon a finding that the producing party acted with an intent to deprive the requesting party of evidence. GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318, 2016 U.S. Dist. LEXIS 93299, at *48–49 (D. Del. July 12, 2016) (ordering $3,000,000 in punitive sanctions where the requesting party showed a pattern of bad faith by the producing party by instructing its employees to delete emails to deprive the requesting party of the evidence in discovery).

39. *See* discussion *infra* Section II.A.2.

40. FED. R. CIV. P. 37 advisory committee's note to 2015 amendments ("The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information."); Alan Klein & Kimberly G. Lippman, *Spoliation of Electronic Information Under Amended Federal Rule 37(e)*, LAW.COM: THE LEGAL INTELLIGENCER (Feb. 7, 2017, 12:00 AM), https://www.law.com/thelegalintelligencer/almID/1202778281178/spoliation-of-electronic-information-

party failed to meet the reasonableness standard of the preservation obligation, it may take action against the spoliating party.[41]

2. Was the Non-Producing Party Prejudiced by the Loss of Information?

Where a loss of information exposes a litigant to prejudice, the court may take the necessary steps to restore the requesting party to the position it would have been in had the ESI been preserved.[42] A party experiences prejudice where the lost ESI cannot be replaced or restored.[43] The imposition of curative measures relies on judicial discretion to determine a fair remedy.[44] The rule provides almost no guidance for such cures, allowing courts to make determinations based on the specific facts of the case.[45] The extent to which a court may impose curative measures is limited to only "measures no greater than necessary to cure the prejudice."[46]

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under-amended-federal-rule-37e/.

41. FED. R. CIV. P. 37(e) (allowing judicial sanction where "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery"); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194.

42. FED. R. CIV. P. 37(e)(1) ("[T]he court upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice . . . ."); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194.

43. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194–95. Where ESI can be reproduced or replaced without impacting the requesting party, a finding of prejudice is inappropriate. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; Klein & Lippman, *supra* note 40.

44. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment ("Much is entrusted to the court's discretion.").

45. *See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment. Rule 37 does not establish which party bears the burden of proving prejudice. *Id.*; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 195.

46. FED. R. CIV. P. 37(e). Curative measures include "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument." FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

3. Did the Producing Party Intend to Deprive a Party of the Information in Litigation?

In determining the necessity of sanctions, courts must evaluate whether the spoliating party acted in bad faith.[47] A determination of bad faith requires a finding that the producing party acted intentionally to "impair the ability of the potential [litigant]."[48] The "intent to deprive" standard creates a uniform test, ameliorating splits across federal circuits.[49]

Where the court finds that a party acted in bad faith or showed an intent to deprive the requesting party of discovery, it may authorize sanctions in the form of an adverse instruction to the jury.[50] Such an instruction allows (or requires) that a jury presume that missing ESI is unfavorable to the spoliating party.[51] This test for an adverse-inference instruction consists of three elements: a duty to

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47. FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 196–97.

48. Micron Tech., Inc., v. Rambus Inc., 917 F. Supp. 2d 300, 315 (D. Del. 2013); *see also* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

49. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193 n.158.

50. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318, 2016 U.S. Dist. LEXIS 93299, at *17 (D. Del. July 12, 2016) (quoting FED. R. CIV. P. 37(e)(2)(B)); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439 (S.D.N.Y. 2004); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193; *see also* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 811–14 (2010). An example of the adverse instruction offered by the *Zubulake* court follows:

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.
>
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
>
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.

Zubulake, 229 F.R.D. at 439–40.

51. FED. R. CIV. P. 37(e)(2)(B) ("[T]he court . . . only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may . . . instruct the jury that it may or must presume the information was unfavorable to the party.").

preserve, a culpable state of mind, and the destruction of relevant evidence.[52] An actor with a culpable state of mind has demonstrated an active purpose of destroying information that could otherwise be used unfavorably.[53] A showing of gross negligence will generally be insufficient for an adverse inference.[54] However, a demonstration of an intentional or willful act of destruction by the producing party will satisfy both the culpability and relevance elements, resulting in case-altering sanctions even where the deliberate act of destruction was unsuccessful.[55] Additionally, relevance "encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant."[56]

52. *Zubulake*, 229 F.R.D. at 430. The test requires:

> (1) [T]hat the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (quoting Byrnie v. Town of Cromwell, 243 F.3d 93, 107–12 (2d Cir. 2001), *superseded by rule*, FED. R. CIV. P. 37(e), *as recognized in* Szewczyk v. Saakian, 774 F. App'x 37 (2d Cir. 2019)).

53. *Micron Tech.*, 917 F. Supp. 2d at 315 ("To make a determination of bad faith, the court must find that the spoliating party 'intended to impair the ability of the potential defendant to defend itself.'" (quoting Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 80 (3d Cir. 1994))); *see also GN Netcom*, 2016 U.S. Dist. LEXIS 93299, at *25–26 (finding bad-faith intent where a senior executive took steps to deprive the requesting party of discovery by deleting information and instructing subordinates to delete information).

54. Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (noting that no adverse inference should arise where the destruction of a document resulted from mere negligence because only bad faith would support an "inference of consciousness of a seek case"); *Zubulake*, 229 F.R.D. at 431 ("[O]nly in the case of willful spoliation does the degree of culpability give rise to a presumption of the relevance of the documents destroyed."); St. Clair Intell. Prop. Consultants, Inc. v. Toshiba Corp., No. 09-354, 2014 U.S. Dist. LEXIS 119216, at *15 (D. Del. Aug. 27, 2014) (finding no bad faith where conduct consists of "inadvertence, negligence, inexplicable foolishness, or part of the normal activities of business or daily living" (quoting Bozic v. City of Washington, 912 F. Supp. 2d 257, 270 (W.D. Pa. 2012))).

55. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; *Zubulake*, 229 F.R.D. at 431 ("When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.").

56. *Zubulake*, 229 F.R.D. at 431.

II. ANALYSIS

The rules of discovery found in the Georgia Civil Practice Act (CPA) provide no differentiation between the treatment of physical and electronic evidence in discovery.[57] As such, Georgia courts address eDiscovery issues on a case-by-case basis, squeezing them into the existing framework governing physical evidence.[58] Because Georgia appellate courts have long showed substantial deference to a trial court's discovery decisions, the few cases that actually receive appellate attention significantly shape the state's precedential jurisprudence.[59] Whether intentionally or otherwise, as Georgia courts try to stretch discovery jurisprudence to also encompass ESI, they risk application of unrealistic standards to big data, increasing the relative simplicity of spoliation.[60]

A. Comparison of the Georgia State and Federal Rules

At the time of its passing, the CPA Rules of Civil Procedure were "substantially identical with the Federal Rules of Civil Procedure," going as far as adopting a corresponding numbering system for the Act's structure in contrast to the Code's usual schema.[61] Courts

57. O.C.G.A. §§ 9-11-26, -34, -37, -54 (2015 & Supp. 2020); Bradberry, *supra* note 2, at 575.

58. *See, e.g.*, AMLI Residential Props., Inc. v. Ga. Power Co., 667 S.E.2d 150, 153–54 (Ga. Ct. App. 2008) ("Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis." (quoting Bouvé & Mohr, LLC v. Banks, 618 S.E.2d 650, 654 (Ga. Ct. App. 2005))); *see also* Hull v. WTI, Inc., 744 S.E.2d 825, 827 (Ga. Ct. App. 2013) (reasoning that a judge should determine sanctions based on the present case's facts and similar cases' discovery treatment); Norfolk S. Ry. v. Hartry, 729 S.E.2d 656, 658 (Ga. Ct. App. 2012); Demido v. Wilson, 582 S.E.2d 151, 155 (Ga. Ct. App. 2003) (reasoning that the plaintiff failed in demonstrating how inspecting the defendant's servers would support his claims).

59. Howard v. Alegria, 739 S.E.2d 95, 103 (Ga. Ct. App. 2013); *Hartry*, 729 S.E.2d at 658 ("Historically it has been the policy of Georgia appellate courts not to interfere with the trial judge's broad discretion granted to him under the discovery provisions of the Civil Practice Act." (quoting Vaughn & Co. v. Saul, 237 S.E.2d 622, 628 (Ga. Ct. App. 1977))); Mincey v. Ga. Dep't. of Cmty. Affs., 708 S.E.2d 644, 651 (Ga. Ct. App. 2011).

60. Bradberry, *supra* note 2, at 575–76; *see also* The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 28–29 (explaining that unfathomable technology issues have required updates to procedural rules).

61. Georgia Civil Practice Act, 1966 Ga. Laws 609 (1966) (codified at O.C.G.A. §§ 9-11-1–133 (2015 & Supp. 2020)); Harper v. DeFreitas, 160 S.E.2d 260, 261–62 (Ga. Ct. App. 1968).

looked to both the FRCP and federal cases as persuasive precedent in considering the construction of the Act and its provisions.[62] Although the FRCP undergo significant revisions to remain current, the provisions of the CPA relevant to ESI remain largely untouched.[63] Even so, where no material differences exist between the text of the FRCP and the CPA, the Supreme Court of Georgia still looks to federal courts for guidance in interpreting and applying procedural rules.[64]

1. Scope of Discovery

Although the twenty-sixth section of the respective procedural rules addresses the scope of discovery, their methods diverge, creating vastly different litigative environments.[65] Both rules explicitly allow discovery of nonprivileged matters relevant to the claim or defense of any party involved in the litigation.[66] Moreover, neither rule requires admissibility within the scope of discovery, though the Georgia statute retains the "reasonably calculated" language removed from the federal rule in 2015.[67]

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62. *See, e.g.*, Ambler v. Archer, 196 S.E.2d 858, 862 (Ga. 1973); Poole v. City of Atlanta, 160 S.E.2d 874, 875 (Ga. Ct. App. 1968); *Harper*, 160 S.E.2d at 262; *see also, e.g.*, Holland v. Sanfax Corp., 126 S.E.2d 442, 445 (Ga. Ct. App. 1962) (explaining that federal cases may serve as persuasive authority where the state law was substantially identical to a federal rule).

63. *See* § 9-11-1; H.B. 1017, 153d Gen. Assemb., Reg. Sess. (Ga. 2016) (which died in committee, never receiving a floor vote); H.B. 643, 151st Gen. Assemb., Reg. Sess. (Ga. 2014) (which passed in the state house but died in the state senate).

64. *See, e.g.*, Chappuis v. Ortho Sport & Spine Physicians Savannah, LLC, 825 S.E.2d 206, 211 (Ga. 2019) (looking to the comparable federal rule and federal courts' interpretations in addressing a matter of first impression); Cmty. & S. Bank v. Lovell, 807 S.E.2d 444, 447 n.6 (Ga. 2017); *Ambler*, 196 S.E.2d at 862; Nw. Mut. Life Ins. Co., v. McGivern, 208 S.E.2d 258, 262 (Ga. Ct. App. 1974).

65. *Compare* FED. R. CIV. P. 26, *with* § 9-11-26.

66. FED. R. CIV. P. 26(b)(1); § 9-11-26(b)(1). Georgia Code section 9-11-26(b)(1) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

§ 9-11-26(b)(1).

67. FED. R. CIV. P. 26(b)(1); § 9-11-26(b)(1) ("It is not ground for objection that the information

However, unlike its federal counterpart, the Georgia rule does not clearly outline a proportionality standard for eDiscovery.[68] In its stagnancy, the CPA fails to establish a balancing test where the burdens of production might outweigh the benefits, though some level of proportionality may be inferred from the CPA's mission to ensure a "just, speedy, and inexpensive determination of every action."[69] Though aspects of the CPA imply that the application of a burden–balancing rule may be within a judge's discretion, the lack of reasonableness and proportionality as an overarching discovery standard suggests Georgia's resistance to adapting new procedures in a technology-driven world.[70]

2. Allocation of Discovery Costs

With regard to the allocation of discovery costs, the federal rules provide guidelines where the state falls silent.[71] The FRCP explicitly limit production that causes undue burden or expense; however, Georgia provides no such provision.[72] Rather, courts temper the liberal scope of discovery primarily by protective order.[73] Though,

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sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). The "reasonably calculated" language created problems that ultimately overtook other limitations on the scope of discovery, leading to its removal. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

68. § 9-11-26.

69. O.C.G.A. § 9-11-1 (2015 & Supp. 2020); *see also* FED. R. CIV. P. 26(b)(2); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 148–49. Even so, the state rule lacks the expansion language "and employed by the court and the parties" that Chief Justice Roberts suggests supports the affirmative duty of cooperation of adverse parties in litigation. CHIEF JUSTICE ROBERTS, *supra* note 12, at 5–6; *see also The Sedona Conference Cooperation Proclamation*, *supra* note 5.

70. *See* AMLI Residential Props., Inc. v. Ga. Power Co., 667 S.E.2d 150, 153 (Ga. Ct. App. 2008); Hull v. WTI, Inc., 744 S.E.2d 825, 827 (Ga. Ct. App. 2013); Norfolk S. Ry. v. Hartry, 729 S.E.2d 656, 668 (Ga. Ct. App. 2012); Bradberry, *supra* note 2, at 574–75; *see also* § 9-11-26(b)(1).

71. FED. R. CIV. P. 26(b)(2); § 9-11-26(b); *see also* BRENT KIDWELL ET AL., ELECTRONIC DISCOVERY § 2.03 (2019).

72. *Compare* FED. R. CIV. P. 26(b)(2)(B) (applying specific limitations to the discovery of ESI), *with* § 9-11-26(b) (providing no differentiation between physical and electronic evidence).

73. § 9-11-26(c); *Hartry*, 729 S.E.2d at 658. *But see* McKesson HBOC, Inc. v. Adler, 562 S.E.2d 809, 814 (Ga. Ct. App. 2002) (reasoning that a court should not implement protective orders without first finding bad faith or harassment by the requesting party). Code section 9-11-26(c) states:

> Upon motion by a party or by the person from whom discovery is sought and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the county where the deposition is to be

where the FRCP specify that protective orders may allocate discovery costs if the burden of production disproportionately affects the producing party, the state equivalent of the Rule 26(c) order limits judicial authority to the scope of discovery, leaving the burdens of cost to the producing party.[74]

Both federal and state rules provide for the prevailing party to recover costs associated with litigation to some extent.[75] Absent an express statutory provision stating otherwise, Georgia leaves cost assessments to the court's discretion, reasoning that a trial judge's familiarity with the case can best assess a fair allocation of expenses.[76] Similarly, litigation costs may be awarded under the FRCP, and like in Georgia, this particular award depends on prevailing in an adversarial proceeding.[77] Note, however, that these costs differ from those imposed as a judicial sanction.[78]

3. Means of Production

Georgia's rules for the form of ESI production provide uncharacteristically similar standards to the federal rules with only minor differences.[79] Both jurisdictions require production of a "reasonably usable form" of data that might otherwise require

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> taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

§ 9-11-26(c).

74. FED. R. CIV. P. 26(b)(2)(C); § 9-11-26(c); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 187.

75. FED. R. CIV. P. 54; O.C.G.A. § 9-11-54 (2015 & Supp. 2020). Georgia Code section 9-11-54(d) states:

> Except where express provision therefor is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against this state and its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by the law.

§ 9-11-54(d).

76. § 9-11-54; Nguyen v. Dinh, 608 S.E.2d 211, 212 (Ga. 2005); Dacosta v. Allstate Ins. Co., 404 S.E.2d 627, 628 (Ga. Ct. App. 1991) (reasoning that a trial judge can best award costs when both parties prevail on different issues); Gold Kist, Inc. v. Williams, 332 S.E.2d 22, 24 (Ga. Ct. App. 1985).

77. FED. R. CIV. P. 54; § 9-11-54(d).

78. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; *see also infra* Section II.A.4.

79. *Compare* FED. R. CIV. P. 34, *with* O.C.G.A. § 9-11-34 (2015 & Supp. 2020).

translation.[80] Additionally, both require specific objections with respect to each item requested.[81] The federal rules specify that parties need not duplicate evidence, though a failure to meet this provision in state court would not satisfy the prejudice requirement necessary to incur sanctions.[82] Despite the differences in wording, the rules read as functionally equivalent.[83]

4. Failure to Make Discovery and Sanctions

Regardless of jurisdiction, failure to comply with a court's discovery order may result in significant, potentially case-dispositive sanctions.[84] The Georgia legislature has yet to create a specific sub-rule for ESI preservation failures, though the current statute leaves ample room for judicial discretion in ordering sanctions.[85] State courts would benefit from a rule modeled after Rule 37(e) by receiving stronger guidance surrounding the implementation of curative measures versus sanctions.[86]

B. Georgia's Spoliation Approach

Georgia courts evaluate the spoliation of evidence largely outside of the procedural statutes of the CPA, turning instead to decades of case law and rules of evidence.[87] Where spoliation occurs, trial courts

80. FED. R. CIV. P. 34(b)(2)(E)(ii); § 9-11-34(a)(1).

81. FED. R. CIV. P. 34(b)(2)(B); § 9-11-34(b)(2).

82. FED. R. CIV. P. 34(b)(2)(E)(iii); *see also infra* Section II.B.1.

83. *Compare* FED. R. CIV. P. 34, *with* § 9-11-34.

84. FED. R. CIV. P. 37; O.C.G.A. § 9-11-37 (2015 & Supp. 2020) ("If a party or an officer, director, or managing agent of a party or a person . . . fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders in regard to the failure as are just . . . .").

85. *See* § 9-11-37. Due to the lack of proportionality standards, a preservation failure related to ESI would automatically fall into the same category as physical evidence. *See id.*

86. FED. R. CIV. P. 37(e); *see also* The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194; The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 160–61; *see* also *infra* Sections II.B.2, III.A.2.

87. O.C.G.A. § 24-14-22 (2013 & Supp. 2020); Phillips v. Harmon, 774 S.E.2d 596, 603 (Ga. 2015); Jones v. Krystal Co., 498 S.E.2d 565, 569 (Ga. Ct. App. 1998); Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 785 (Ga. Ct. App. 1996).

exercise wide discretion to designate sanctions appropriate to the facts of the case.[88]

1. Spoliation Framework

Georgia defines spoliation as "the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation."[89] Although the state does not recognize spoliation as an actionable tort, its occurrence within a case may give rise to an unfavorable presumption, allowing a jury to infer that any missing evidence would have been unfavorable to the spoliating party, or other remedies.[90] State case law establishes an elemental test for spoliation: for a party to seek remedies for spoliated evidence, the requesting party must demonstrate that (1) the spoliating party had notice of existing or pending litigation; (2) the spoliating party maintained custodial control over the evidence in question; and (3) the spoliation resulted in prejudice or harm in the suit.[91]

To receive a remedy for spoliation, a party must first show that the producing party had an obligation to preserve the evidence in question.[92] Georgia's original test looked for "contemplated or pending litigation" to trigger the preservation duty.[93] However, in the

88. Wright v. VIF/Valentine Farms Bldg. One, LLC, 708 S.E.2d 41, 46 (Ga. Ct. App. 2011) (quoting AMLI Residential Props., Inc. v. Ga. Power Co., 667 S.E.2d 150, 154 (Ga. Ct. App. 2008)).

89. Baxley v. Hakiel Indus., 647 S.E.2d 29, 30 (Ga. 2007) (quoting Bouvé & Mohr, LLC v. Banks, 618 S.E.2d 650, 654 (Ga. Ct. App. 2005)).

90. § 24-14-22; Butler v. Turner, 555 S.E.2d 427, 432 (Ga. 2001) (Carley, J., dissenting) ("Georgia does not recognize any independent causes of action for damages caused by perjury, spoliation of evidence, or other fraudulent alteration, destruction, or concealment of evidence in a prior judicial proceeding."); Sharpnack v. Hoffinger Indus., Inc., 499 S.E.2d 363, 364 (Ga. Ct. App. 1998); *see also infra* Section II.B.2. Code section 24-14-22 states:

> If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted.

§ 24-14-22.

91. *Phillips*, 774 S.E.2d at 603; *Jones*, 498 S.E.2d at 569; *Chapman*, 469 S.E.2d at 785.

92. *Phillips*, 774 S.E.2d at 603 (quoting Whitfield v. Tequila Mexican Rest. No. 1, Inc., 748 S.E.2d 281, 287 (Ga. Ct. App. 2013)).

93. Silman v. Assocs. Bellemeade, 685 S.E.2d 277, 278 (Ga. 2009) (quoting Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am., Inc., 574 S.E.2d 923, 925 (Ga. Ct. App. 2002)); *Baxley*,

2015 case *Phillips v. Harmon*, the Supreme Court of Georgia expanded the rule, holding that notice of litigation "can be constructive as well as actual" and providing a five-factor test for determining the foreseeability of litigation.[94] The test weighs circumstantial factors to evaluate whether a reasonable person might anticipate litigation, triggering the duty to preserve before the receipt of actual notice.[95]

Courts have yet to clearly establish the extent to which this preservation duty applies to electronic evidence owned by an entity.[96] In *Phillips*, the court repeatedly referred to "the duty to preserve *relevant* evidence" rather than any evidence, implying the existence of a relevancy factor limiting the scope of the obligation.[97] Even so, the question of whether or not a court would limit the financial burdens of preservation to comport with the principles identified by the Sedona Conference remains unanswered.[98]

Additionally, spoliation requires a showing that the spoliating party maintained custody of the evidence.[99] Although courts recognize that a party must have custody of evidence to be liable for

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647 S.E.2d at 30 (quoting *Bouvé & Mohr*, 618 S.E.2d at 654).

94. 774 S.E.2d at 605. The court in *Phillips* described the five-factor test as follows:

> Notice that the plaintiff is contemplating litigation may also be derived from, i.e., litigation may be reasonably foreseeable to the defendant based on, other circumstances, such as the type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances.

Id.

95. *Id*.

96. *Id.* at 604.

97. *Id.* (emphasis added); *see also* Cooper Tire & Rubber Co. v. Koch, 812 S.E.2d 256, 263 (Ga. 2018); Sheats v. Kroger Co., 805 S.E.2d 121, 127 (Ga. Ct. App. 2017) (quoting *Phillips*, 774 S.E.2d at 604); Sachtjen v. State, 798 S.E.2d 114, 116 n.1 (Ga. Ct. App. 2017) (quoting *Phillips*, 774 S.E.2d at 604).

98. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 95, 187 ("[C]osts and burdens preserving large amounts of ESI may be disproportionate to the needs of the case, and even the sole copy of an ESI item need not be preserved if doing so would be disproportionate to the needs of the case.").

99. Jones v. Krystal Co., 498 S.E.2d 565, 569 (Ga. Ct. App. 1998) (limiting the consequences for spoliation to those circumstances where the spoliated evidence was within the producing party's control).

its spoliation, they do not limit that control to the producing party alone but rather extend the definition to include those acting as the party's agents.[100]

However, this approach to control oversimplifies the complexities of data by presuming a straightforward, bright-line understanding of the custody of evidence.[101] Because digital evidence exists within networks and across devices, which are both often accessible by multiple actors, the court's method neglects the intricacies of third-party service providers and their effect on data ownership.[102] Moreover, it raises further questions about the cooperation requirements of these third parties in both the preservation obligation and the production of evidence.[103]

Reasoning that the spoliation of evidence "renders a full defense impossible," courts require a finding of prejudice against the requesting party.[104] Because remedies against a spoliating party seek to level the playing field between parties, a finding that no prejudice exists precludes remedial measures.[105] In *Chapman v. Auto Owners Insurance Co.*, the Georgia Court of Appeals adopted a five-factor test for evaluating the prejudicial effects of spoliated evidence.[106]

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100. Bouvé & Mohr, LLC v. Banks, 618 S.E.2d 650, 654 (Ga. Ct. App. 2005) (finding evidence that the spoliating third party acted as an agent of the producing party sufficient to apply sanctions); *see also* Boswell v. Overhead Door Corp., 664 S.E.2d 262, 263 (Ga. Ct. App. 2008) (denying a spoliation presumption where the movant offered no evidence that the spoliating party acted as the producing party's agent).

101. The Sedona Conf., *Commentary on Rule 34 & Rule 45*, *supra* note 1, at 479–80; *see also* Memorandum from J. David G. Campbell, Advisory Comm. on Fed. Rules of Civ. Proc., to J. Jeffrey Sutton, Chair, Standing Comm. on Rules of Prac. & Proc. 15 (June 14, 2014), https://www.uscourts.gov/sites/default/files/st09-2014-add_0.pdf [https://perma.cc/GL6H-PMTD].

102. *See* The Sedona Conf., *Commentary on Rule 34 & Rule 45*, *supra* note 1, at 479–80. Federal circuits currently disagree on the scope of the obligation regarding third-party ownership, with standards examining the right to obtain documents, the ability to practically obtain documents absent the legal right to obtain, and others. *Id.* at 482.

103. *Id.* at 573.

104. AMLI Residential Props., Inc. v. Ga. Power Co., 667 S.E.2d 150, 154 (Ga. Ct. App. 2008) (quoting Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am., Inc., 574 S.E.2d 923, 926 (Ga. Ct. App. 2002)).

105. Sharpnack v. Hoffinger Indus., Inc., 499 S.E.2d 363, 364 (Ga. Ct. App. 1998) (reasoning that without prejudice, there is no measure of damages to remedy). Here, Georgia remains generally consistent with the FRCP regarding prejudice and remedial measures. *See* FED. R. CIV. P. 37 advisory committee's note to 2015 amendment; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 195.

106. 469 S.E.2d 783, 785 (Ga. Ct. App. 1996); *see also* Headley v. Chrysler Motor Corp., 141 F.R.D.

The *Chapman* test weighs the following factors: (1) the prejudice against the defendant, (2) curability of said prejudice, (3) the evidence's practical importance in litigation, (4) the good or bad faith of the producing party, and (5) the potential abuse stemming from expert testimony.[107] The test strongly resembles the Sedona Conference guidance on the conditions a court should consider when addressing remedial measures.[108] Courts use the *Chapman* analysis both in determining the prejudicial effect and evaluating the necessary sanctions.[109]

2. Remedies to Spoliation Available in Georgia

Georgia's spoliation theory aims to remedy the prejudice a party experiences during litigation where the opposing party interferes "with the opportunity to win a lawsuit."[110] Where interference occurs, courts recognize and evaluate the appropriate sanctions.[111] Using the *Chapman* factor test, courts determine sanctions on a case-by-case basis, ranging from the unfavorable presumption to case-altering, exclusionary sanctions.[112]

Georgia's evidentiary rules establish the only statutory remedy for spoliation.[113] The law intended to penalize a party for withholding evidence within its control or relying on weaker evidence; however, the Supreme Court of Georgia has limited its application to only the

362, 365 (D. Mass. 1991).

107. *Chapman*, 469 S.E.2d at 785. Abuse from expert testimony might occur when the spoliating party's expert has already evaluated the evidence. *Id.* Without the evidence, the requesting party could not produce their own expert witness to assess the evidence. N. Assurance Co. v. Ware, 145 F.R.D. 281, 284 (D. Me. 1993).

108. *Chapman*, 469 S.E.2d at 785; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 194.

109. WellStar Health Sys., Inc. v. Kemp, 751 S.E.2d 445, 453–54 (Ga. Ct. App. 2013); *AMLI Residential Props.*, 667 S.E.2d at 154; *Bridgestone/Firestone N. Am. Tire*, 574 S.E.2d at 926; R.A. Siegel Co. v. Bowen, 539 S.E.2d 873, 878 (Ga. Ct. App. 2000).

110. *Sharpnack*, 499 S.E.2d at 365 (emphasis omitted).

111. *R.A. Siegel*, 539 S.E.2d at 877 (excluding expert testimony where the producing party's reckless disregard of a discovery order amounted to bad faith); *Sharpnack*, 499 S.E.2d at 364.

112. *AMLI Residential Props.*, 667 S.E.2d at 154 ("Where a party has destroyed or significantly altered evidence that is material to the litigation, the trial court has wide discretion to fashion sanctions on a case-by-case basis."); *Chapman*, 469 S.E.2d at 785.

113. O.C.G.A. § 24-14-22 (2013 & Supp. 2020).

most extreme cases.[114] An unfettered application of the unfavorable presumption, in essence, disposes of the case against the producing party.[115] A strict interpretation of the statute forgoes the idea that the spoliated evidence might pose a significant loss to the producing party, limiting the potential damage from the evidence to the unconstrained imagination of a jury.[116] By requiring an element of bad faith for an unfavorable presumption, Georgia holds its litigants to the federal standard.[117]

Where the presumption would prove insufficient to remedy spoliation, courts consider exclusionary sanctions or outright dismissal of the case.[118] When evaluating sanctions other than the unfavorable presumption, courts revisit *Chapman* to determine an appropriate remedy.[119] Such sanctions range from the exclusion of testimony surrounding the evidence to dismissal of the case entirely.[120]

The complete disposition of a case typically requires intentional destruction of evidence to make the opposing presentation of a defense nearly impossible.[121] Additionally, when seeking summary judgment as a remedy, courts require a meaningful connection, or

114. Phillips v. Harmon, 774 S.E.2d 596, 606 (Ga. 2015); Fields v. Yellow Cab Co. of Atlanta, 56 S.E.2d 845, 847 (Ga. Ct. App. 1949) (decided under former Code section 38-119); Pamela L. Ferrell, *Think Twice Before Filing a Spoliation Motion Against a Plaintiff in Georgia*, BUTLER SNOW: PROD. LINES BLOG (Dec. 6, 2018), https://www.butlersnow.com/2018/12think-twice-before-filing-spoliation-motion-against-a-plaintiff-in-georgia/ [https://perma.cc/TB39-FNRA].

115. *R.A. Siegel*, 539 S.E.2d at 878 (noting that the severity of sanctions is sometimes "the functional equivalent of striking the answer or dismissal").

116. Cooper Tire & Rubber Co. v. Koch, 812 S.E.2d 256, 265 (Ga. 2018).

117. FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, supra note 4, at 196–97. *But see AMLI Residential Props.*, 667 S.E.2d at 155 (noting that exclusionary sanctions may be appropriate even without bad faith).

118. Lee Wallace, *Spoliation of Evidence*, 8 GA. BAR J. 12, 14 (2002).

119. Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 785 (Ga. Ct. App. 1996); Wallace, *supra* note 118.

120. Wright v. VIF/Valentine Farms Bldg. One, LLC, 708 S.E.2d 41, 47 (Ga. Ct. App. 2011) (quoting Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am., Inc., 574 S.E.2d 923, 926 (Ga. Ct. App. 2002)); *AMLI Residential Props.*, 667 S.E.2d at 154; *R.A. Siegel*, 539 S.E.2d at 878.

121. R & R Insulation Servs. v. Royal Indem. Co., 705 S.E.2d 223, 240 (Ga. Ct. App. 2010) ("Dismissal is usually reserved for cases involving malicious destruction of evidence, which does not appear to be the case here."); Giles v. Schwans Home Serv., No. 11EV013280A, 2013 Ga. State LEXIS 1794, at *2 (Ga. State Ct. Mar. 12, 2013).

causal link, between the spoliated evidence and the underlying claim.[122] Even where spoliation may have obviously occurred, summary judgment is only appropriate where the destroyed evidence would otherwise link the claims.[123]

III. PROPOSAL

To protect the interests of Georgia's litigants, the laws guiding discovery must progress to include considerations of big data and its associated risks. Although the existing framework allows for proportionality and reasonableness, the lack of explicit safeguards risks the application of unduly burdensome standards.

A. Conceptual Changes to Georgia's Discovery Procedure

Updating the rules will not require an overhaul of the CPA; rather, minor changes to the existing statutory schema can significantly reshape Georgia's jurisprudence.[124] A contemporary approach to eDiscovery must embrace proportionality and equitable sanctions to bring the state into the twenty-first century.[125]

1. Georgia Must Explicitly State the Role Proportionality Plays in the Discovery of ESI

The proportionality protections of the FRCP are, at best, implied in state discovery rules.[126] Moreover, the scant protections of Georgia

122. Wilson v. Mountain Valley Cmty. Bank, 759 S.E.2d 921, 925 (Ga. Ct. App. 2014); Craig v. Bailey Bros. Realty, 697 S.E.2d 888, 891 (Ga. Ct. App. 2010), *disapproved of by* Phillips v. Harmon, 774 S.E.2d 596, 606 (Ga. 2015); Hardeman v. Spires, 492 S.E.2d 532, 534 (Ga. Ct. App. 1997), *vacated*, 496 S.E.2d 895 (Ga.), *remanded to* 503 S.E.2d 588 (Ga. Ct. App. 1998).

123. *Compare* Baxley v. Hakiel Indus., 647 S.E.2d 29, 30 (Ga. 2007) (where cameras would have shown the defendant was driving), *with Craig*, 697 S.E.2d at 891 (where the spoliated evidence, had it been produced, would not link the plaintiff's claims to the defendant's conduct as to overcome summary judgment).

124. *See infra* Section III.B.1.

125. *See* The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 147–49.

126. FED. R. CIV. P. 26, 37; O.C.G.A. §§ 9-11-26, -37 (2015 & Supp. 2020); *see also supra* Section II.A.

law rely on an aging judiciary to understand the implications of new technologies and apply them to a field they may no longer recognize.[127] The lack of emphasis in state rules risks the very misapplications that the drafters of the FRCP sought to eliminate.[128] To prevent the reincarnation of issues previously resolved by the federal system, the state must adapt old-school discovery practices to embrace the digitalization of our new reality.[129]

Proportionality must govern the scope of a party's preservation obligation.[130] By balancing the costs of digital preservation with the uniqueness of the information, courts may determine whether a party can reasonably be bound by the duty to preserve.[131] Further, a party's discovery requests must be proportionate to the specific needs of the case.[132] The financial burdens must be weighed against the requesting party's interests of informational access, the availability of other pertinent resources, and the importance of discovery in resolving the issues of the case.[133] Finally, a party's action or inaction should be considered by the court because it can impact the efficiency, cost, and timeliness of litigation.[134]

127. *See* J. Ralph Artigliere, *A State Court Judge's View on E-Discovery (Part One)*, E-DISCOVERY TEAM: L. & TECH., https://e-discoveryteam.com/2010/11/08/a-state-court-judges-view-on-e-discovery-part-one [https://perma.cc/A3TP-ZZLP]. In 2017, the average age of an Article III judge was sixty-eight, and the average age at initial appointment was fifty. *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR. [hereinafter *Demography of Article III Judges*], https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges [https://perma.cc/K325-4HB8]. The same year, the average age of newly appointed or elected judges in Georgia was forty-nine. Honorable P. Harris Hines, Chief Justice, Sup. Ct. of Ga., 2017 State of the Judiciary Address (Jan. 25, 2017, 11:00 AM), https://www.gasupreme.us/2017-state-of-judiciary-address/ [https://perma.cc/ZL37-A5EU]. It follows that the average judge was already presiding in the early 2000s when ESI became a relevant topic of conversation. *See Demography of Article III Judges*, *supra*.

128. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

129. *Id.*; FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

130. The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 150.

131. *Id.* at 150–53.

132. *Id.* at 157–59.

133. FED. R. CIV. P. 26(b); The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 168.

134. The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 159.

2. Georgia Should Adopt the Two-Tiered Approach to Sanctions Established in Federal Rule of Civil Procedure 37(e)

The strength of Rule 37(e) rests in the distinction between accidental and intentional loss of information.[135] The rule applies a commonsense approach that mitigates accidental loss while intentionally punishing bad faith.[136] In issuing sanctions for the spoliation of ESI, Georgia courts should employ a similar division.

With one exception, the *Chapman* framework for evaluating prejudice offers an ideal starting point for evaluating sanctions under a divided scheme.[137] Because this analysis seeks only to cure prejudice, however, the producing party's good or bad faith should be removed from consideration.[138] A thorough, fact-specific *Chapman* analysis paints a clear picture of the prejudice a party experienced while also identifying the means necessary to ameliorate the findings.[139]

When considering punitive sanctions, courts must employ an independent analysis, first determining the existence of bad faith and then identifying the appropriate action.[140] Where prejudicial remedies seek to level an uneven playing field, sanctions for intentional

135. FED. R. CIV. P. 37; *see also* Alison Grounds & Scott Wandstrat, *E-Discovery Bill Is Bad Policy but Will Keep Us Busy, Experts Write*, LAW.COM: DAILY REP. (Feb. 22, 2016, 12:00 AM), https://www.law.com/dailyreportonline/almID/1202750159861/ediscovery-bill-is-bad-policy-but-will-keep-us-busy-experts-write/?slreturn=20200901183820; Leslie J. Bryan, *E-Discovery Bill Addresses Complexity Between General Georgia Courts and Limited Federal Courts, State Bar of Georgia's Task Force Chair Writes*, LAW.COM: DAILY REP. (Feb. 22, 2016, 11:00 AM), https://www.law.com/dailyreportonline/almID/1202750274069/ediscovery-bill-addresses-complexity-between-general-georgia-courts-and-limited-federal-courts-state-bar-of-georgias-task-force-chair-writes/.

136. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

137. Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 785 (Ga. Ct. App. 1996); *see supra* Section II.B.2.

138. *See* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; *Chapman*, 469 S.E.2d at 785. The producing party's good or bad faith will still play a critical role in later sanction analysis. *See infra* notes 140–43 and accompanying text.

139. WellStar Health Sys. v. Kemp, 751 S.E.2d 445, 453–54 (Ga. Ct. App. 2013); AMLI Residential Props., Inc. v. Ga. Power Co., 667 S.E.2d 150, 154 (Ga. Ct. App. 2008); Bridgestone/Firestone N. Am. Tire, LLC v. Campbell Nissan N. Am., Inc., 274 S.E.2d 923, 926 (Ga. Ct. App. 2002); R.A. Siegel Co. v. Bowen, 539 S.E.2d 873, 878 (Ga. Ct. App. 2000).

140. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; *Chapman*, 469 S.E.2d at 785.

spoliation intend to punish parties who act in bad faith.[141] The severity of the measures authorized by the court should reflect the culpability of the producing party.[142] Further, the adverse presumption available under Georgia's evidentiary guidelines should only be applied under this test after a finding of intent.[143]

B. Implementing Changes to Georgia Law

With those considerations in mind, the question shifts to how Georgia might make such changes. The majority of states have modernized discovery procedures by enacting statutes, while others have seen reform through the highest courts of the state.[144] How the state accomplishes these changes makes little difference, so long as steps are taken to effectuate procedural change.

1. Legislation to Modernize the Civil Practice Act

Though legislative action is the most direct way to update the rules of the CPA, such change requires lawmakers to reach a consensus on the best method to codify procedures governing ESI.[145] The most recent attempt to rewrite the law demonstrates the extreme differences of opinion that have kept the State of Georgia in the Typewriter Age.[146]

In 2016, Georgia House Bill 1017 (H.B. 1017) presented the state with its most recent opportunity to revamp discovery procedure but ultimately never left the state's house floor.[147] The bill's deviation

141. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193–96. Because this test seeks to prevent culpable action by the producing party, the prejudice experienced by the requesting party is entirely irrelevant and should not play a part in the consideration. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 195.

142. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 196.

143. The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193–96.

144. MICHAEL R. ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE § 7.15 (4th ed. 2019).

145. H.B. 1017, 153d Gen. Assemb., Reg. Sess. (Ga. 2016). On multiple occasions, Georgia has tried to update the CPA to encompass eDiscovery and failed to pass legislation. *Id.*; H.B. 643, 151st Gen. Assemb., Reg. Sess. (Ga. 2014).

146. *See* Ga. H.B. 1017.

147. *Id.*

from the federal rules sparked controversy, pitting plaintiffs attorneys against those defending larger corporations with higher volumes of data.[148] Under the guise of proportionality, the bill required additional steps by the producing party to receive protection from overly burdensome discovery requests.[149] Additionally, by modifying a few key phrases, the bill restructured Rule 37's two-tiered sanctioning guidelines, eliminating the intent requirement necessary for an adverse jury instruction or other case-altering penalties.[150] By declining to pass H.B. 1017, the Georgia House of Representatives prevented the implementation of legislation that would have otherwise undermined the principles and guidance provided by Rule 37—specifically, the spirit of cooperation and the standards of fairness and proportionality—that Georgia needs to modernize discovery.[151]

Effective compromise necessary to pass new legislation necessitates a paradigm shift that considers both sides as requesting and producing parties, each of whom may reasonably expect protection from the court.[152] Lawmakers must reconsider the "us-versus-them" narrative guiding debates, instead balancing the benefits received by a requesting party with the burdens attributed to the producing party.[153] A solution should seek to produce a fair

148. *See* Grounds & Wandstrat, *supra* note 135; Bryan, *supra* note 135.

149. Ga. H.B. 1017; Grounds & Wandstrat, *supra* note 135; Bryan, *supra* note 135. By moving the proportionality language to part (c), the bill required a producing party to obtain a protective order to limit the requesting party's access to information. Ga. H.B. 1017. Though the factors match the corresponding federal rule exactly, the implementation has the opposite effect that creates burdens rather than limiting them. FED. R. CIV. P. 26; Ga. H.B. 1017; The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 154.

150. FED. R. CIV. P. 37(e); Ga. H.B. 1017; Grounds & Wandstrat, *supra* note 135. Where the FRCP specifically differentiate between sanctions to cure prejudice and those to punish intentional deprivation of evidence, the proposed bill combined them into an amalgam of sanctionable conduct that provided no guidance for judicial implementation. *Compare* FED. R. CIV. P. 37(e), *with* Ga. H.B. 1017. The attempted revision mistook two independent factors, intent to deprive evidence and prejudice to the producing party, as the two ends of the spoliation spectrum, proposing a broad, discretionary middle ground that undermined any guidance within the rule. Bryan, *supra* note 135.

151. Ga. H.B. 1017; The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 155–56.

152. *See* Grounds & Wandstrat, *supra* note 135.

153. *Id.*; *see also* Bryan, *supra* note 135.

outcome for both parties rather than a favorable one for only one party.[154]

2. Promulgation of Uniform Rules by the Supreme Court of Georgia

In light of the legislature's inability to pass legislation updating the CPA, Georgia should follow the example of at least thirteen other states that have exacted change by order of their respective state's highest court.[155] Such an order could take one of two forms: a proposed amendment to the CPA or the implementation of a uniform rule.[156] A proposed amendment requires ratification by the Georgia General Assembly, perpetuating the cycle that has prevented change thus far.[157]

The Supreme Court of Georgia's constitutional authority allows for the establishment of uniform court rules providing for efficient, low-cost dispute resolution; however, such rules must comport with the existing statutes comprising the CPA.[158] Since 2015, the court has already used this approach to bridge the gap between the federal and state variations on Rule 26.[159] Likewise, the court should consider a similar bridge to Rules 26(b) and 37.[160] Such a change could

154. *See* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; Grounds & Wandstrat, *supra* note 135.

155. *See generally* Order (Ala. Nov. 4, 2009), https://judicial.alabama.gov/docs/rules/Rules%2016263334374551A%20FINAL.pdf [https://perma.cc/B2M8-E3LP]; *In re* Various Ariz. Rules of Civ. Proc., No. R-17-0010, 2017 Ariz. LEXIS 340 (Aug. 31, 2017); Letter from Rachelle M. Resnick, Clerk, Ariz. Sup. Ct., to Georgia L. Paul et al. (Sept. 6, 2007) (on file with the Georgia State University Law Review); *In re*: Electronic Discovery and Proposed Ark. R. Civ. P. 26.1, No. 08-923 (Ark. Mar. 5, 2009); *In re* Amendment of Rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23, & 4011 of the Pa. Rules of Civ. Proc., No. 564 (Pa. 2012); *In re* Super. Ct. Rules of Civ. Proc., 2017 R.I. LEXIS 105 (R.I. Nov. 6, 2017); *In re* Petition to Amend Selected Provisions of Tenn. Sup. Ct. Rule 8, 2016, No. 2016-01382, Tenn. LEXIS 529 (Tenn. Aug. 18, 2016); *see also* ARKFELD, *supra* note 144.

156. GA. CONST. art. VI, § 9, para. 1; O.C.G.A. § 15-2-18 (2020).

157. § 15-2-18.

158. GA. CONST. art. VI, § 9, para. 1; Edwards v. State, 636 S.E.2d 508, 510 (Ga. 2006) (holding that the supreme court may not implement rules that would otherwise abrogate existing statutes).

159. FED. R. CIV. P. 26(f); § 15-2-18; GA. UNIF. SUPER. CT. R. 5.4.

160. FED. R. CIV. P. 26(b), 37.

transform the landscape of civil discovery and also further the goals of uniformity and fairness that support the state's judicial system.[161]

This Note proposes, as an example, the following addendum to Rule 5 of the Uniform Rules of the Superior Courts of the State of Georgia:[162]

> Rule 5.6. Proportionality in Electronic Discovery
>
> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.[163] On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.[164] In weighing the burden on the producing party against the benefit to the requesting party, the court shall consider:
>
> 1) Whether the burden on the producing party results from the party's prior action or inaction;[165]
> 2) The financial burdens incurred in the production of the evidence;[166] and
> 3) Nonmonetary factors including, but not limited to: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the

161. GA. CONST. art. VI, § 9, para. 1; GA. UNIF. SUPER. CT. R. 1.

162. GA. UNIF. SUPER. CT. R. 5. Rule 5, "Discovery in Civil Actions," currently ends with Rule 5.5, "Privilege." *Id.* The proposed Rule includes additions to the Uniform Rules of the Superior Courts of the State of Georgia that do not currently exist in Georgia's civil procedure. *Id.*

163. FED. R. CIV. P. 26(b)(2)(B). This line directly establishes the proportionality standard of Rule 26. FED. R. CIV. P. 26(b)(1); *see also* The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 56–69. *See generally* The Sedona Conf., *Commentary on Proportionality*, *supra* note 14.

164. FED. R. CIV. P. 26(b)(2)(B).

165. The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 159.

166. FED. R. CIV. P. 26(b)(2)(B); The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 167–68.

> parties' resources, and (5) the importance of the discovery in resolving the issues.[167]

The proposed change begins by explicitly defining a proportionality standard that invokes the language of the federal rules.[168] In combining the structure of the federal rules with the standards promulgated by the Sedona Conference, the proposed Rule establishes factors to guide the court through an evidentiary cost–benefit analysis that balances the burdens of production with the importance of the evidence.[169]

Additionally, this Note proposes a second addendum to Rule 5 of the Uniform Rules:

> Rule 5.7. Failure to Preserve Electronically Stored Information
>
> Upon receiving actual or constructive notice of pending litigation, a party must take reasonable steps to preserve electronic evidence.[170] Where the court finds that a party failed to make reasonable preservation efforts:
>
> 1) If the loss of the information results in prejudice against the requesting party, the court may order curative measures that do not exceed the suffered prejudice;[171] or
> 2) If the producing party intentionally deprived the requesting party of the information's use in litigation,

167. FED. R. CIV. P. 26(b)(1); The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 168–69; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 65–71.

168. FED. R. CIV. P. 26(b)(2)(B).

169. FED. R. CIV. P. 26(b)(2)(B); The Sedona Conf., *Commentary on Proportionality*, *supra* note 14, at 159, 167–69; The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 65–71.

170. *See* FED. R. CIV. P. 37(e); Phillips v. Harmon, 774 S.E.2d 596, 605 (Ga. 2015). This applies the proportionality requirements to the existing state case law for triggering the preservation obligation. FED. R. CIV. P. 37(e); *Phillips*, 774 S.E.2d at 605.

171. *See* FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193–97.

> the court may impose sanctions consistent with O.C.G.A. § 9-11-37(b).[172]

This additional change builds on existing aspects of case law and also maintains reasonableness standards that distinguish physical and electronic evidence.[173] From there, it establishes a distinction between curative measures addressing prejudice and punitive judicial action otherwise absent in Georgia's jurisprudence.[174]

CONCLUSION

New advances in technology have revolutionized society, requiring the rapid implementation of a new legal framework.[175] As technology continues to shape the course of human interaction, society demands a method to use these developments to settle inevitable conflict.[176] Though most other states have, through the legislative process or by order of the state's highest court, adapted the discovery process to reflect current technology, Georgia remains one of the few holdouts.[177]

As it stands, the CPA does not differentiate between the mechanisms for discovering physical and electronic evidence.[178] Current state discovery guidelines rely on the judicial application of implied proportionality standards.[179] With a full generation between new lawyers and freshly-appointed judges, the informational gap between attorneys and the bench challenges the court to officiate a

172. *See* O.C.G.A. § 9-11-37(b) (2015 & Supp. 2020); FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193–97.

173. *See* FED. R. CIV. P. 37(e); *Phillips*, 774 S.E.2d at 605.

174. § 9-11-37(b); FED. R. CIV. P. 37(e); The Sedona Conf., *The Sedona Principles*, *supra* note 4, at 193–97; *see also supra* Section II.B.2.

175. *See* Schafer & Mason, *supra* note 6, at 18–35.

176. *See* MICHAEL R. ARKFELD, JUDICIAL BENCH BOOK: ELECTRONIC DISCOVERY AND EVIDENCE § 1.1 (2016 ed.).

177. *See* cases cited *supra* note 155; *see also* ARKFELD, *supra* note 144.

178. O.C.G.A. §§ 9-11-26, -34, -37, -54 (2015 & Supp. 2020); Bradberry, *supra* note 2.

179. *See supra* Section II.A.

game under outdated rules where the objective has evolved.[180] The rules of discovery lack the explicit standards of proportionality and fairness needed to protect the interests of Georgia litigants.[181]

To modernize the CPA, Georgia must first explicitly state the role of proportionality in discovery, particularly in reference to ESI and metadata. Further, the state must incorporate sanctioning guidelines that mitigate the prejudice of unintentional loss and impose penalties only upon a finding of bad faith. Though these changes would by no means solve every eDiscovery problem, they represent a decision by the state to take steps towards the future.

180. Honorable Hines, *supra* note 127; *Demography of Article III Judges*, *supra* note 127.
181. *Compare* FED. R. CIV. P. 26, *and* FED. R. CIV. P. 37(e), *with* § 9-11-26, *and* § 9-11-37.